SUPREME COURT, U. S.
FEB 10 1975
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-16

HAYES INTERNATIONAL CORPORATION, *Petitioner*

v.

DR. JOHN L. McLUCAS, Secretary of the Air Force, *Respondent*

and

THE BOEING COMPANY, *Intervenor-Respondent*

## REPLY BRIEF FOR PETITIONER

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## REPLY BRIEF FOR PETITIONER

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Petitioner, Hayes International Corporation, hereby respectfully replies to the briefs filed by the respondent, Dr. John L. McLucas, Secretary of the Air Force, and by the intrevenor-respondent, The Boeing Company, in opposition to the petition for a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit in this proceeding. Pursuant to Rule 24, this reply is limited exclusively to issues and/or arguments raised for the first time by the respondents in their briefs.

Respondents seriously misstate the relevant facts and issues in this proceeding. More importantly, they attempt, unsuccessfully, to underrate the national importance of the case and the clear requirement for consideration of the case and guidance by this Court. In this reply brief, petitioner will respond briefly to

set the record straight but the petition and the decision of the Court of Appeals speak for themselves with respect to the national importance of the case.

Lest there be any misapprehension as a result of the respondents' briefs: The ultimate legal issue before the Court involves a question of conflict of interest in the award and performance of a Government contract. The potential costs to the American taxpayer resulting from the conflict of interest exceed $200,000,000. The case affects directly and materially the *public interest* in the integrity of the federal procurement system. On its face, this case cries out for review by the Supreme Court.

**THE RESPONDENT'S (GOVERNMENT) BRIEF**

1. In its piecemeal statement of facts, the Government contends that petitioner is not entitled to a judicial remedy because it did not file this action early in 1971 when the solicitation leading up to the illegal contract awarded to Boeing was originally issued. Only by reading footnote 5 which appears on page 3 of the Government brief are the true facts revealed in their proper context. In that footnote the Government recognizes, as it must, that petitioner timely brought this action in the district court after it was reported by an unnamed "White House Source," subsequent to the award of the contract to Boeing, that the contract might ultimately be worth $200,000,000. Because of the obvious inconsistency between the Boeing bid and the White House report of the potential value of the contract to Boeing ($60 versus $200 million for five years), petitioner's suspicions were understandably aroused and petitioner initiated an inquiry concerning the relationship between The Boeing Company and the Air Force with respect to the KC-135 fleet. As described in more detail in the petition, it was that

inquiry which led to the initiation of this case. Apparently, the Government would penalize petitioner for not having earlier suspected the conflict of interest which the investigation ultimately brought to light. *See* Pet. for Cert., pp. 10-11.

2. The Government rather half-heartedly endorses the Court of Appeals position that the federal organizational conflict of interest regulations were not "meant" to apply to the "types" of contracts involved in this case. The Government's main argument goes to the merits, namely that "Boeing's contract here does not create the possibility of exclusive dealing that the conflict of interest regulations were intended to avoid." (Resp. Br., p. 4) Precisely the opposite is the case. The district court and Court of Appeals found as fact all of the elements of a privileged relationship and "exclusive dealing" which petitioner alleged. Further, the courts found, correctly, that Boeing is presently performing modifications to the KC-135 aircraft which Boeing recommended prior to award and which involve expenditures in the $200,000,000 range referred to by the unnamed "White House source." *See* Pet. for Cert., pp. 11-13.

The Court of Appeals stated:

> The repairs and modifications which Boeing recommended to the Air Force comprised in part the work the IRAN/Modification contractor would perform. *Boeing was thus in a position to recommend changes and modifications to aircraft which would enhance the value of the IRAN/Modification contract it subsequently was awarded.* [Pet. for Cert., App. A, pp. 6a-8a; Emphasis added.]
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> * * *
>
> At trial *Hayes proved that Boeing recommended three specific sets of modifications which had the effect of greatly increasing the value of the IRAN/Modification contract it obtained, information*

*which neither of its competitors possessed at the time of bidding.* These three sets of repairs involved alterations to the aerial boom,[7] and two sets of wing modifications. One of the wing modifications is actually being performed by Boeing under its IRAN/Modification contract, as is the aerial boom modification but the most substantial repair, Wing Fatigue Package V (which was valued as being in excess of $200,000,000) was awarded to Boeing subsequent to the filing of this litigation on a sole source basis.[8]

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[7] The aerial boom is the nozzle by which fuel is transferred in mid-air from the KC-135 tanker to other aircraft. The alterations in it which Boeing performs under its IRAN/Modification contract have an estimated cost of $2,000,000.

[8] The two sets of wing modifications were issued in the form of so-called "Wing Fatigue packages," both of which Boeing performed. Wing Fatigue Package IV was issued to Boeing under the IRAN/Modification contract 3366. *Wing Fatigue Package V involved far more extensive changes in the wings of every KC-135 aircraft, and at a unit price of $313,934.00 amounts to a total cost for a modification of the entire fleet of over $200,000,000.* This modification was later issued to Boeing under a separate contract, No. F34601-72-C-4213-PZ0003, as opposed to being assigned to Boeing under its IRAN/Modification contract. [Pet. for Cert., App. A, pp. 9a-10a; Emphasis added.]

As stated in the Petition for Certiorori, the nub of the matter is that a conflict of interest exists because Boeing gained a substantial economic stake in recommending to the Air Force under its sustaining engineering contracts specific modifications which Boeing is accomplishing under the IRAN/Modification contract. If this is not "exclusive dealing" (which even the Government suggests is legally prohibited), then what is?

3. The Government also cautiously approaches the central issue of public policy in this case. Without denying categorically that a conflict of interest exists here, the Government opines that there is no public

policy against "all forms of potential conflicts of interest." It further argues that the federal courts lack power or authority to set aside a Government contract merely because the contract would result in an "undesirable procurement policy." (Resp. Br., p. 5) What the Government fails to state is that we are not concerned in this case with an abstract "form of conflict of interest," but rather with a *proven* conflict involving costs to the Government of $200,000,000. We also are not concerned with desirable or "undesirable" procurement policy as the Government would have this Court believe, but rather with administrative illegality and a patently *illegal* contract. The Government respondent simply refuses to face the facts of this case.

4. Finally, the Government attempts to raise by way of a footnote in its brief the important question of the Court's jurisdiction. (Resp. Br., p. 7, fn. 4) Without formally seeking certiorari on the issue, the Government contends that petitioner lacks standing to sue and a "legal interest" which entitles it to seek relief. This is directly contrary to the holding of both the federal district court and the Court of Appeals for the Fifth Circuit. Both courts held that petitioner had standing to sue and that the district court had original jurisdiction of the case. The detailed and extremely scholarly consideration by the Fifth Circuit of the jurisdictional issues, including citations to the leading precedent cases in this and other federal courts, appears in the Appendix to the Petition for Certiorari herein, at pp. 12a-24a.

**THE INTERVENOR-RESPONDENT'S (BOEING) BRIEF**

5. The Boeing Company's brief is noteworthy for its misstatements of facts and law. The intervenor boldly states that the case does not raise issues of national importance nor involve potential costs to the

American taxpayer resulting from a conflict of interest. (Int.-Resp. Br., p. 3) This broad conclusory allegation directly contravenes the decision of the Fifth Circuit which recognized by its treatment of the case the importance of the legal issues involved and specifically found as fact that the costs in question total more than $200,000,000.

6. The Boeing brief attempts to give the impression that the Court of Appeals for the Fifth Circuit affirmed the reasoning of the district court on the merits and further determined that the federal conflict of interest regulations were inapplicable to this case. It is true that the Court of Appeals determined that the federal conflict of interest regulations were inapplicable to this case. Petitioner challenges as erroneous this conclusion of law by the Court of Appeals. However, the Court of Appeals did *not* adopt the reasoning of the trial court on the merits. To the contrary, the Fifth Circuit found all of the facts necessary to prove a conflict of interest existed, but held that there were no applicable regulations which prohibited the conflict (*i.e.*, rendered it illegal) in this case.

7. Interestingly, the respondents follow different tacks with respect to the applicability of the regulations. The Government respondent's view that the regulations have only limited applicability has already been discussed. Intervenor-respondent argues principally that the regulations apply only to "systems engineering and technical direction." This is entirely incorrect and contrary to the language of the regulations. Nothing at all in ASPR § 1-113.2 or in Appendix G even remotely suggests that the regulations or the Rules for the Avoidance of Organizational Conflicts of Interest contained therein apply only to contractors who perform systems engineering and technical direction. The only reference to systems engineering and

technical direction in the ASPR provisions governing organizational conflicts of interest appears in Rule 1 of Appendix G. By their terms, the rules are only *examples* of possible conflict of interest situations.

In any event, as indicated in the petition herein, to the extent the examples have applicability, this case *does* come within Rule 1 and *does* involve systems engineering and technical direction. The system to which Rule 1 applies in this case is the weapons system consisting of the KC-135 fleet of aircraft. Pursuant to its sustaining engineering and other related support services contracts on the KC-135 fleet, Boeing performs systems engineering and technical direction on this "system" within the contemplation of Rule 1 and thus comes within the prohibitions of that Rule.

The entire issue of "administrative interpretation" of regulations in this case is a red herring. It has been proffered by respondents in an effort to justify the award of a patently illegal contract and should be rejected by this Court. It opens the door to abuse by Government officials of the administrative process, not compliance with validly promulgated regulations governing their activities. Contrary to the decision below, the federal regulations in question are *not* mere "cabalistic jargon." (Pet. for Cert., App. A, p. 29a.) They are clear and readable and should be enforced. This Court should not permit this case to be the precedent for Government officials through "administrative interpretation" of regulations governing their conduct to justify illegal administrative action.

8. Finally, the intervenor-respondent cites several cases which stand for the proposition that federal intervention in the procurement process should be limited to instances of illegality. Petitioner agrees with these cases wholeheartedly. Although this action was filed

prior to the cited decisions of the D.C. Circuit in *M. Steinthal & Co.* v. *Seamans,* 455 F.2d 1289 (D.C. Cir. 1971), and *Wheelbrator Corp.* v. *Chafee,* 455 F.2d 1306 (D.C. Cir. 1971), petitioner in fact alleged illegality in the original complaint filed in the district court and still alleges illegality today. As intervenor-respondent well knows, illegality and the public policy against conflicts of interest are the sum and substance of this case.[1]

WHEREFORE, for the foregoing reasons and for the reasons set forth in the petition, a writ of certiorari should be issued to review the decision of the United States Court of Appeals for the Fifth Circuit in this proceeding.

Respectfully submitted,

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[1] Intervenor-respondent notes that inadvertently it was not served with a copy of petitioner's request for an extension of time within which to file the petition. No damage to the intervenor resulted or is alleged, and the intervenor sought and was granted an extension of time to file its response to the petition. Pursuant to Rule 22, the petition was timely filed on July 3, 1975 and service was made on that date on the Solicitor General and the intervenor-respondent.

# CERTIORARI DENIED